



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-97-3

### FACTS:

You serve on the School Committee ("School Committee") of a municipality ("Municipality X"), the members of which are elected and uncompensated and have been classified as special municipal employees as provided by G.L. c. 268A, §1(n).

You were a member of the founding coalition of individuals who joined together to apply for and receive a charter to operate The ABC Charter School ("ABC School" or AABC") and, without election or appointment, you continued on as a member of ABC's initial Board of Trustees ("Board of Trustees" or Trustees"). The Board of Trustees includes employees and officials of Municipality X, parents and individuals associated with several private business and nonprofit entities.

The ABC School was created in 1995 by a 5-year charter granted by the Secretary of the Massachusetts Executive Office of Education ("EOE") pursuant to G.L. c. 71, §89 (Statute)<sup>1/</sup> and its implementing regulations, 601 CMR §§1.00 *et seq.* ("Regulations"). ABC's by-laws ("By-Laws") provide that there may be no more than 15 Trustees and that the Trustees elect their own successors to staggered 3-year terms. The By-Laws establish no criteria or qualifications for membership on the Board of Trustees. The Trustees are not compensated for their services. ABC, acting through the Trustees, leases its building from Municipality X.

The ABC School has entered into a 5-year contract ("Contract") with DEF ("Educational Contractor") to operate and manage ABC, performing substantially all of ABC's educational services. The Contract was submitted to and reviewed by EOE during its charter-granting process.

You ask what limitations the conflict of interest law imposes on your serving as a member of the ABC School's Board of Trustees and as a School Committee member. In order to advise you, we will first provide an overview of the statutory and regulatory scheme governing charter schools such as ABC.

### Statutory and Regulatory Framework

#### Organization and Purposes

A charter school is "*a body politic and corporate*, with all powers necessary or desirable for carrying out its charter program," and a "*public school*, operated under a charter granted by the board of education, which operates independently of any school committee and is managed by a board of trustees," who, once the charter is granted, "*shall be deemed to be public agents authorized by the Commonwealth to supervise and control the charter school.*" Statute ¶¶7 and 1.<sup>2/</sup> Among the purposes for establishing charter schools are to: stimulate the development of and provide innovative and performance-based programs within *public* education; provide more school-choice options and alternative, innovative methods of educational instruction and school structure and management; and "hold teachers and school administrators accountable for students' educational outcomes." Statute ¶2.

#### Governance, Governing Body and Employees

A charter school is governed by "its charter and the provisions of law regulating *other public schools.*" Statute ¶12. While charter schools must have administrative and management plans, including by-laws, Regulations

§1.05(2)(a), each school has considerable flexibility to implement an internal form of governance that is consistent with its mission and philosophy. Neither the Statute nor the Regulations prescribe the contents of charter schools' by-laws or the composition, qualifications, criteria for or manner of selection or terms of office of their initial or subsequent boards of trustees, all of which may vary from school to school.

A charter school's board of trustees and its employees are considered to be *public employers and public employees*, respectively, for tort liability and collective bargaining purposes, respectively. Statute ¶15. Charter school teachers who are employed by the school are subject to the state teacher retirement system. *Id.*<sup>3/</sup>  
Board of Trustees' Responsibilities and Powers

Charter school boards of trustees' responsibilities are similar to those of school committees. In consultation with teachers, the trustees must determine their school's curriculum and budget. Statute ¶14. Other trustee duties include the development of a student code of conduct and admissions, disciplinary and expulsion policies; personnel policies; and management and operations plans. EOE "1996 Charter School Application" at p. 15; Statute ¶¶4 and 10; Regulations §1.05(2).

Charter schools have "all powers necessary and desirable for carrying out their charter programs, including" (i) the powers to acquire real property for school facility use; to receive, solicit, and disburse funds, grants and/or gifts for school purposes; to contract for services, equipment and supplies; and (ii) such other powers available to business corporations that are not inconsistent with the Statute. Statute ¶7.

#### Governmental Control and Oversight

The Massachusetts State Board of Education ("Board of Education") exercises its authority under the Statute through the Commissioner of the Massachusetts Department of Education ("Department"). The Department is responsible for assessing the effectiveness and monitoring improvements of all public schools. G.L. c. 69, §1A, ¶10. Charter school students must "meet the same performance standards, testing and portfolio requirements set by the board of education in other *public* schools." Statute ¶13. Although a charter school's board of trustees is responsible for the charter school's overall governance, management and operation, the Board of Education<sup>4/</sup> has numerous powers and responsibilities associated with its charter-granting and ongoing review and assessment role, including the following:

1. establishing and implementing procedures and guidelines for reviewing charter applications and granting, conditioning, revoking and renewing 5-year charters and placing schools on probation;
2. approving a school's mission, management and progress-assessment plans and material changes in its program or governance, including "substantive changes in its educational philosophy or mission, school schedule, admissions process, governance structure, by-laws, school management contract, code of conduct, enrollment capacity, or school location" and material changes that may have a "significant impact on a charter school's ability to fulfill its goals or mission";
3. approving changes in the composition of a school's board of trustees;
4. approving contracts under which a school intends "to procure substantially all educational services";
5. approving a school's student code of conduct and expulsion policies;
6. conducting ongoing reviews and assessments of schools, through annual reports, financial statements and on-site visits;
7. investigating complaints not adequately addressed by a school's board of trustees;
8. requiring charter amendments to certain substantive or material changes to a school; and
9. requiring remedial action, including probationary status or charter revocation, in case of changes in circumstances that significantly impact a school's ability to fulfill its goals or mission.

Statute ¶¶ 4-7, 10, 21-24; Regulations §§1.05(1), 1.05(2), 1.07-1.11.

## Funding

The Statute and the Regulations, as implemented, provide that charter schools are to receive public funding through monies that, in effect, “follow” each student from the school district in which the student resides (“sending district”) to the charter school the student attends. The Department calculates each sending district’s “average cost per student,” which, in traditional public schools, is funded in part directly by local property taxes and in part with so-called “Chapter 70” public school state aid. For each sending-district student who attends a charter school, an amount equal to the entire “average cost per student” in that sending district (*i.e.*, the aggregate of the amount that would ordinarily be paid by the municipality from local property taxes and the amount of Chapter 70 state aid) is deducted from the pool of Chapter 70 state aid that would otherwise be paid by the Commonwealth to that sending district. The State Treasurer then pays that entire amount directly to the student’s selected charter school.<sup>5/</sup> Statute ¶26; Regulations §’ 1.02 and 1.06. In actuality, through a combination of legislation and accounting mechanisms, the Commonwealth has lightened the economic burden for sending districts by fully or partially reimbursing sending districts for their lost Chapter 70 funds. St. 1995, c.267, §19, as amended by St. 1996, c. 151, §525. Charter schools may also receive funding from other public or private sources but may not charge tuition or application fees. Statute ¶¶7(g) and 4.

### QUESTIONS:

1. For purposes of the conflict of interest law, (i) is the ABC School a public or a private entity, and (ii) if public, is it a state or municipal agency?
2. May you serve on both the Board of Trustees of the ABC School and the School Committee?

### ANSWERS:

1. The ABC School is (i) a public rather than a private entity and (ii) a state rather than a municipal agency for purposes of the conflict of interest law. Because they are uncompensated for their services, the members of ABC’s Board of Trustees are special state employees.
2. Yes, subject to the limitations discussed below.

### DISCUSSION:

#### I. Jurisdiction

The threshold jurisdictional issues are whether the ABC School is a public or a private entity, and, if public, whether it is state or a municipal agency.

##### A. Public or Private Entity

It is well-established that:

§[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, the end that the purpose of its framers may be effectuated.’

*McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 424-425 (1992), quoting from earlier opinions of the Supreme Judicial Court.

Accordingly, we observe that, throughout the Statute, the Legislature has explicitly and consistently described charter schools as *public* schools and their educational programs as *public* education. Statute ¶¶2, 7, 12 and 13. The Statute characterizes charter schools’ boards of trustees and employees as *public* employers and employees, respectively, for tort liability and collective bargaining purposes and provides that their teachers are subject to the state teacher retirement system. Statute ¶15. In addition, charter schools’ boards of trustees are deemed “to be *public agents* authorized by the commonwealth.” Thus, based on the plain language of the Statute, we conclude

that charter schools are public agencies for purposes of the conflict of interest law.<sup>6/</sup>

## B. State or Municipal Agency

In determining whether an entity is a state or municipal agency, the Commission has considered which level of government oversees and funds the entity and whether the entity carries out functions similar to those of a particular level of government. *See EC-COI-95-2*, citing earlier opinions. In this case, considering those factors and the totality of the circumstances described below, we conclude that, although the ABC School has certain local characteristics, it is a state agency for purposes of the conflict of interest law. *See, e.g., EC-COI-95-2* (Metropolitan Area Planning Council is a state agency although it has certain local characteristics).

First, the Board of Education (not municipalities or their school districts) has a wide range of control and oversight powers over the initial and continued existence and operations of charter schools, including the ultimate powers to create and extinguish them. During the charter-granting and ongoing review and assessment processes, the Department reviews each charter school's application, governance and management, educational program, goals and mission, evaluation plans, finances and other aspects of its structure and operations. Among its powers, the Board of Education may grant 5-year charters and impose conditions on charter schools, place charter schools on probationary status, renew or revoke charters, review and approve charter schools' contracts "to procure substantially all educational services" from others, approve student codes of conduct and admissions, disciplinary and expulsions policies and conduct ongoing reviews of and investigate complaints against charter schools. The Board is also empowered to review and approve various changes in a charter school's structure, governance, mission and operations and to review budgets, conduct audits and assess the performance of each school. *See Governmental Control and Oversight* discussion above. In addition, the Commonwealth (not a municipality or a school district) acquires title to charter schools' property when they cease to exist. Regulations §1.11(6).

Second, the Commonwealth at least partially funds charter schools. Under the Statute, the State Treasurer pays each charter school from state funds per student tuition payments based on "the average cost per student" multiplied by the number of students attending the school. At least currently, the Commonwealth partially or fully reimburses the sending districts for their Chapter 70 monies transferred to charter schools. While at least some of the Commonwealth's funding for a charter school may be derived from local property taxes, neither the municipality in which a charter school student resides nor the student's sending district, if different, has any control over the charter school funding process.

Finally, the provision of elementary and secondary education to children at the public expense is an essential and traditional governmental function. *See EC-COI-92-26; McMann, supra* at 425-427 (1992). While the Legislature has generally placed the duty of maintaining public schools and providing public education with municipalities acting through elected school committees (G.L. c. 71, §1, G.L. c. 43, §§31 and 33; G.L. c. 71, §71; *McMann, supra* at 425), the Supreme Judicial Court has determined that, under Part II, c. 5, §2 of the Massachusetts Constitution, ultimately the "the Commonwealth has a duty to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth at the public school level . . ." *McDuffy v. Secretary of Executive Office of Education*, 415 Mass. 545, 606 (1993). Through its enactment of the Statute, the Legislature has authorized charter schools' boards of trustees to provide an educational alternative under the oversight of the Board of Education and the Department, independently of school committees.

By contrast, then, to the situation with traditional public schools, the Statute and the Regulations explicitly provide that charter schools are to operate "independently of any school committee." Neither the Statute nor the Regulations contemplate any role for municipalities and/or school districts in the creation, operation or management of charter schools.

For these reasons, we conclude that charter schools are state agencies<sup>7/</sup> for purposes of the conflict of interest law.

## II. Application of Conflict of Interest Law

Given our conclusion that the ABC School is a state agency, as a member of its Board of Trustees, you are a special state employee.<sup>8/</sup> As a School Committee member, you are a special municipal employee. *See* G.L. c.

268A, §1(n). You may serve on both the ABC School's Board of Trustees and the School Committee subject to the restrictions of §§6, 17, 4 and 23.

#### A. Restrictions on Your Activities as a Trustee - §§6 and 17

##### Section 6

Section 6 will restrict your activities as a Trustee if you continue as a School Committee member. In relevant part, it prohibits a state employee from participating in any particular matter<sup>9/</sup> in which to his knowledge he or a business organization in which he serves as an officer, director, trustee, partner or employee has a financial interest. "Participation"<sup>10/</sup> includes both formal and informal lobbying of colleagues, reviewing and discussing, giving advice and making recommendations, as well as deciding and voting on particular matters. *EC-COI-92-30*; see *Graham v. McGrail*, 370 Mass. 133 (1976). The financial interest may be of any size and may be either positive or negative. *EC-COI-84-96*. It must, however, be direct and immediate or reasonably foreseeable in order to implicate §6. *EC-COI-84-123*; *EC-COI-86-25*; *84-98*; *84-96*.

Municipality X and its municipal agencies are considered to be "business organizations" for purposes of §6, see *EC-COI-92-25*, and, as a School Committee member, you are a municipal employee of Municipality X. Therefore, under §6, you may not, for example, participate as a Trustee in the Trustees' consideration of the business terms of the ABC School's lease of its building from Municipality X or other agreements for use of Municipality X's facilities. Moreover, you may not participate as a Trustee in matters such as the Trustees' application for limited grant or other money for which a Municipality X school or other municipal agency is a competitor. That is because Municipality X has a reasonably foreseeable financial interest in such matters.

In certain circumstances, a state employee who has an appointing official may seek and obtain an exemption from the §6 prohibition. However, it does not appear that as a Trustee, you have an appointing official. Therefore, in your situation, no exemption appears to be available to you. In reaching our conclusion that you do not have an appointing official, we have considered several factors. First, neither the Statute nor the Regulations prescribe any procedure for appointment or election of charter schools' boards of trustees. They are silent about who, if anyone, is to be the appointing official for charter schools' boards of trustees; they do not even prescribe a selection process or criteria for selection of such trustees. Second, in effect, you selected yourself to serve as a Trustee, having been a member of the ABC School's founding coalition and continued on as a member of its initial Board of Trustees. You cannot be your own "appointing official" for the purposes of §6 or any other provisions of the conflict of interest law. Finally, even though (during ABC's charter-granting process) EOE had the opportunity to review the composition of the initial Board of Trustees and presumably did not object to your serving, we cannot conclude from such tacit approval either that the Legislature intended the Board of Education or the Department to make the types of determinations contemplated for appointing officials by the §6 exemption process.<sup>11/</sup>

##### Section 17

Section 17, applicable to you as a School Committee member-special municipal employee, will restrict your "outside" or non-municipal activities. Section 17 prohibits a municipal employee from receiving compensation from or acting as agent<sup>12/</sup> or attorney for anyone other than the municipality or a municipal agency in relation to any particular matter in which the municipality or a municipal agency is a party or has a direct and substantial interest. Those limitations apply less restrictively to special municipal employees such as you in your capacity as School Committee member.

As applied to your situation, §17(c) will prohibit you from acting as the Board of Trustees' agent in relation to particular matters (i) in which you participated as a School Committee member, (ii) which are or within one year have been the subject of your official responsibility<sup>13/</sup> as a School Committee member or (iii) which are pending before the School Committee (if you serve on more than 60 days<sup>14/</sup> during any period of 365 consecutive days). On the other side of the lease example described above, assuming that such lease is the subject of your official responsibility as a School Committee member, you may not act as agent for the Board of Trustees in connection with that lease. See, generally, *Commission Advisory 13A* (reviewing restrictions on municipal employees' acting as agents).

## B. Restrictions on Your Activities as a School Committee Member - §4

Section 4, the state counterpart of §17, is applicable to you as a Trustee-special state employee and will restrict your “outside” or non-state activities. It prohibits a state employee from receiving compensation from or acting as agent or attorney for anyone other than the Commonwealth or a state agency in relation to any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest. The rationale behind these prohibitions is that public employees should be loyal to the state, and, where their loyalty to the state conflicts with their loyalty to another person or entity, the state’s interest must prevail. Section 4’s limitations apply less restrictively to special state employees such as you in your capacity as a Trustee.

As applied to your situation, §4(c) will prohibit you from acting as the School Committee’s agent in relation to particular matters (i) in which you participated as a Trustee, (ii) which are or within one year have been the subject of your official responsibility as a Trustee or (iii) which are pending before the Board of Trustees (if you serve on more than 60 days during any period of 365 consecutive days). Thus, for example, assuming that the Board of Trustees’ lease of its School building is the subject of your official responsibility as a Trustee, you may not act as agent for any Municipality X agency in connection with the lease. You may, however, participate in the School Committee’s internal ordinary business, including discussions and even votes about such lease.<sup>15/</sup> See *EC-COI-93-12*; *92-25*; *Commission Advisory 13B* (reviewing restrictions on state employees’ acting as agents).

## C. Restrictions on Your Activities in Both Positions - §23

Section 23 imposes standards of conduct that are applicable to all public employees, certain of which are particularly relevant. First, §23(b)(2) prohibits a public employee from using his official position to secure for himself or others an unwarranted privilege of substantial value<sup>16/</sup> that is not properly available to similarly situated individuals. Under §23(b)(2), the Commission has consistently prohibited public employees from using their titles, time during which they are supposed to be working for their public employers or public resources or facilities, including, for example, secretarial services and copying facilities, for the benefit of or to promote the interests of others. See, e.g., *Public Enforcement Letter 92-3*; *EC-COI-92-28*, n. 2; *EC-COI-90-04*.

As applied, you may not, for example, use your School Committee position or any resources or facilities of the School Committee to provide unwarranted benefits to the ABC School or the Educational Contractor, nor should you use your position as a Trustee or resources or facilities of ABC to provide unwarranted benefits to any Municipality X agency.

Second, §23(b)(3), the so-called “appearances” section, prohibits a public employee from acting in a manner that would lead a reasonable person, having knowledge of the relevant circumstances, to conclude that anyone can improperly influence him or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person, but this section also provides a means for dispelling any such impression. Thus, even if §6 would not require you to abstain from participating in particular matters that come before the Board of Trustees, you may still be required to file a written disclosure of all relevant facts before you participate. Similarly, you may be required to file such disclosures before participating in School Committee matters. Because, as a Trustee, you have no appointing official, that disclosure must be made in a manner that is public in nature.<sup>17/</sup> As a School Committee member, you must file your disclosure with Municipality X’s Clerk. We also suggest that it is good practice to make a similar oral, public disclosure for inclusion in the minutes of the meeting(s) at which such matter arises is reviewed, considered or voted upon.

Finally, §23(c)’s confidentiality standards prohibit a public employee from disclosing to others (including other levels of government) or using to further his personal interest confidential information that he acquires during his tenure as a public employee. “Confidential information” is information that is unavailable to the general public as “public records.”

DATE AUTHORIZED: May 14, 1997

<sup>15/</sup> The Statute, originally enacted as §55 of the Education Reform Act, St. 1993, c. 71, was most recently amended by St. 1996, c. 151, §§223-225. Unless otherwise indicated, when we refer to the Statute, we mean the Statute as so amended.

<sup>2/</sup> When quoting the Statute here and elsewhere, we have added emphasis.

<sup>3/</sup> The Massachusetts Teachers Retirement Board has determined that charter school teachers who are employed by private management entities under contract with the schools are not subject to that system.

<sup>4/</sup> In a governmental reorganization, the Legislature dismantled EOE and transferred to the Board of Education the responsibility for regulating and overseeing charter schools. St. 1996, c. 151, §§223 through 225. The Regulations are being amended to reflect that change.

<sup>5/</sup> (text of footnote deleted)

<sup>6/</sup> If the Legislature had intended to exempt charter schools from the applicability of the conflict of interest law, it could have stated so explicitly, as it did, for example, by exempting charter schools from teacher tenure and dismissal laws. Statute ¶12.

<sup>7/</sup> “State agency,” any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town. G.L. c. 268A, §1(p).

<sup>8/</sup> In relevant part, a “state employee” is defined as “a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis. . . .” G.L. c. 268A, §

1(q). In relevant part, a “special state employee” is defined as “a state employee . . . who is performing services or holding an office, position, employment or membership for which no compensation is provided. . . .” G.L. c. 268A, §1(o).

<sup>9/</sup> “Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>10/</sup> “Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

<sup>11/</sup> As the Commission observed in *EC-COI-87-39*, n. 8., our conclusion will not foreclose us from reconsidering this issue, should we be squarely presented with facts indicating that the subject charter school trustee has an “appointing official(s)” who is appropriate and for whom it is feasible to exercise the role contemplated by §6. In this regard, we note that the initial and subsequent members of different charter schools’ boards of trustees may be selected in a variety of ways in accordance with the particular charter school’s by-laws.

<sup>12/</sup> We have said that “the distinguishing factor of acting as agent within the meaning of the conflict law is ‘acting on behalf of’ some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications.” *In re Sullivan*, 1987 SEC 312, 314-315; *See also, In re Reynolds*, 1989 SEC 423, 427; *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992).

<sup>13/</sup> “Official responsibility,” the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i). “Official responsibility turns on the authority to act, and not on whether that authority is exercised.” *EC-COI-89-7*.

<sup>14/</sup> Service on any portion of a day constitutes one day’s service. *See EC-COI-91-5; 85-49*.

<sup>15/</sup> In this regard, we note that §19, the municipal counterpart to §6, is not implicated because the Commission does not consider state agencies to be “business organizations.” *See EC-COI-92-25*, n. 1; *92-11; 92-3*, n. 3; *85-67; AG Conflict Opinion No. 30* (“pr. 25, 1963).

<sup>16/</sup> Anything having a value of \$50 or more is “of substantial value.” *EC-COI-93-14; Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes)*.

<sup>17/</sup> We advise you that you should file any such public disclosures with the Ethics Commission and the Board of Trustees.